

No. 18792

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID NEILL MACMURRAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

	Page
I.	
Jurisdiction and statement of the case	1
II.	
Statutes involved	2
III.	
Statement of facts	3
IV.	
Summary of argument	9
V.	
Argument	9
A. Appellant was not entitled to an inquiry and hearing upon the denial of his claim to conscientious objectors status	9
B. The selective service act's criteria for determining conscientious objector status are constitutional	12
VI.	
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases	Page
Bouziden v. United States, 251 F. 2d 728	10
Bradshaw v. United States, 242 F. 2d 180	10
Clark v. United States, 236 F. 2d 13, cert. denied 352 U. S. 882, reh. denied 352 U. S. 937....	11, 12, 13
George v. United States, 196 F. 2d 445, cert. denied 344 U. S. 843	12, 13
Richter v. United States, 181 F. 2d 591	12
Selby v. United States, 250 F. 2d 666	10
United States v. De Lime, 223 F. 2d 96	11
United States v. Kauten, 133 F. 2d 703	13
United States v. Mohammed, 288 F. 2d 236	12

Statutes

United States Code, Title 28, Sec. 1291	1
United States Code, Title 28, Sec. 1294	1
United States Code, Title 50, Appendix, Sec. 456(j)	2, 9, 10
United States Code, Title 50, Appendix, Sec. 462	1, 2

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I.

JURISDICTION AND STATEMENT OF THE CASE.

The Federal Grand Jury for the Southern District of California returned Indictment No. 31776-CD on February 6, 1963, charging appellant with violating the Universal Military Training and Service Act, Title 50 Appendix, Section 462, United States Code. On April 8, 1963, appellant was tried by the court. On April 22, 1963, his motions to dismiss the Indictment and for judgment of acquittal were denied, he was found guilty and sentenced to three years in prison. On the same day appellant gave notice of appeal.

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II. STATUTES INVOLVED.

Title 50 App., Section 462, United States Code provides in part:

“Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both. . . .”

Title 50 App., Section 456(j), United States Code provides in part:

“Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human

relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

* * * * *

Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing.”

III.

STATEMENT OF FACTS.

On July 3, 1958, appellant registered at Local Board No. 84, 10935 Camarillo Street, North Hollywood, California. [SS p. 1.]¹

On November 24, 1958, Local Board No. 84 mailed to appellant Selective Service System Form 150 for Conscientious Objectors, and this form was received from appellant by the Board on June 26, 1959. [SS pp. 13, 15.] On his Form 150, appellant claimed exemption from military service in any form, and answered the questions under the title “Series II—Religious Training and Belief.”

¹SS refers to appellant's Selective Service file, Exhibit 1.

- (1) In response to question one's inquiry as to whether he believed in a Supreme Being, appellant checked the box labeled "No."
- (2) In response to question two which asked him to describe the nature of his belief which is the basis for his claim of exemption from military service, appellant stated "the make-up of my personality and mind have established definite beliefs and principles against the use of war, or violence in any form; and the principles of the Armed Services for carrying out these ends."
- (3) In response to question three which asked defendant to explain how, when, and from whom or from what source he received the training and acquired the belief which is the basis of his claim for exemption, defendant stated "I have received my training in these moral attitudes from my parents, friends, schooling, and environmental influences. These beliefs were acquired at no particular time but are a part of my mental constitution."
- (4) In response to question four which asked appellant to give the name and present address of the individual upon whom he relies most for religious guidance, appellant stated "I rely on myself for my religious guidance."
- (6) In response to question six which asked appellant to describe the actions and behavior in his life which in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions, appellant stated "I have a great regard for the value of human life, as well as a love of all peoples and races. I am a

very creative person being a poet, musician, and writer. I am very sensitive person completely intolerant of violence and destructive measures.”
[SS pp. 16-17.]

On February 10, 1960, appellant was classified 1-A by Local Board 84, and on February 11, 1960, appellant was mailed notice of said classification. [SS p. 13.]

On March 1, 1960, the Local Board received a request from appellant to extend his appeal period and also for a personal appearance. [SS p. 27.] The Local Board approved appellant's requests and on March 17, 1960, mailed him a letter notifying him that an appointment had been made for his appearance before the Board on May 11, 1960. [SS p. 29.]

On May 11, 1960, the Board received from appellant a letter requesting that his personal appearance be re-scheduled for a later date due to the fact that he had been unable to prepare a statement of reasons to justify a different draft classification, and because he did not have means of transportation to the meeting with the Board. [SS p. 30.]

The Board approved appellant's request for re-scheduling of his appearance and on May 19, 1960, notified him that a new appointment had been made for July 13, 1960. [SS p. 32.]

On July 12, 1960, the Board received from appellant a letter requesting that his appointment be re-scheduled to a still later date. On July 13, 1960, the appellant did not appear as scheduled. [SS pp. 33-35.]

On July 13, 1960, the Local Board notified appellant that it was not in a position to postpone his ap-

pearance to a future time and that no change had been made in his classification. The Board further advised appellant that if he wished to furnish further information to be considered by the Local Board or the Appeal Board he should submit it in writing on or before July 25, 1960. [SS p. 36.]

On July 27, 1960, appellant's file was forwarded to the Appeal Board, and the Board subsequently made the tentative determination that appellant should not be classified in Class 1-O or lower. The Appeal Board then requested a report as to appellant's last address so that he could be notified of the time and place of a hearing before a hearing officer upon his claim that he was a conscientious objector. The Appeal Board was then notified that since appellant indicated that he did not believe in the existence of a Supreme Being the Department of Justice concluded that he was not as a matter of law entitled to be classified as a conscientious objector, and that appellant had not filed a claim within the meaning of the Universal Military Training and Service Act such as confers jurisdiction upon the Department of Justice to conduct an inquiry, hold a hearing, and make a recommendation to the Appeal Board. Thereafter, on March 23, 1961, appellant was classified 1-A by the Appeal Board. [SS pp. 37-39, 41-44.] On March 28, 1961, appellant was notified of his classification. [SS p. 13.]

On November 21, 1961, the Local Board mailed appellant an order to report for physical examination on December 1, 1961. On July 18, 1962, the Local Board

was notified by the Induction Station that appellant had been found fully acceptable for induction into the Armed Forces. [SS pp. 54, 58.]

On July 24, 1962, the Local Board ordered appellant to report for induction on August 20, 1962. Appellant replied by a letter which stated that the Board members "are apparently stupid asses because of their lack of thought processes and their inability to come to a just and obvious decision even with the facts before them." [SS pp. 60, 61-63.]

In the response to appellant's letter the Local Board notified appellant that his file would be brought before the Board for consideration and re-classification. [SS p. 64.]

On August 7, 1962, appellant requested a personal appearance before the Local Board, which request was denied. [SS pp. 66, 69.]

On August 16, 1962, appellant appeared at the Local Board with Leroy Preminger and together they reviewed appellant's Selective Service File. [SS p. 71.] Thereafter, on August 17, 1962, appellant wrote the Local Board stating that he would like to bring new information to the Board's attention. Appellant's letter indicated that he believed in certain things which should be considered a Supreme Being and that his belief should properly be considered as based on religious belief. Appellant asked that his answers to the previously mentioned questions of whether he believed in a Supreme Being and whether they were based on religious

belief be stricken from his file and that his letter be inserted in place of his previous answers. Appellant also requested that the Board re-open his file and take all necessary steps to arrive at a more just and proper classification. [SS pp. 72-75.]

On August 21, 1962, the Local Board was notified by the U.S. Army Induction Station that appellant's acceptability was undetermined pending a Conscientious Objector Waiver. [SS p. 77.] On October 26, 1962, the Local Board received notice from the Induction Station that appellant had been found fully acceptable for induction into the Armed Forces. On October 26, 1962, the Local Board also received notice that a request for Waiver of Civil Offenses had been approved and appellant's induction into the Armed Forces was authorized provided he was otherwise qualified. [SS pp. 81, 93.]

On October 26, 1962, appellant was notified that he should report for induction on November 26, 1962. Appellant was also later notified of the mailing of this letter by telephone. [SS pp. 84, 85.]

On November 26, 1962, appellant reported to the Armed Forces Induction Station, was processed for induction, and was determined fully qualified for induction in all respects. However, appellant refused to be inducted into the Armed Forces, and furnished a signed statement concerning his refusal. [SS pp. 86-87, 88, 89-90.]

IV.

SUMMARY OF ARGUMENT.

- A. Appellant Was Not Entitled to an Inquiry and Hearing Upon the Denial of His Claim to Conscientious Objector Status.
- B. The Selective Service Act's Criteria for Determining Conscientious Objector Status Are Constitutional.

V.

ARGUMENT.

- A. Appellant Was Not Entitled to an Inquiry and Hearing Upon the Denial of His Claim to Conscientious Objector Status.

Title 50 U. S. C. App., Section 456(j) exempts from combatant training and service in the armed forces:

“. . . any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code.

* * * * *

“Any person claiming exemption from combatant training and service because of *such conscientious objections* shall, if *such claim* is not sustained by the local board, be entitled to an appeal to the appropriate appeal board.” [Emphasis added] [Thereafter, inquiry and all hearing with respect to the character and good faith of the objections of the person concerned are required].

The statute plainly states that inquiry and hearing are available to persons claiming exemption because of conscientious objections as statutorily defined. The definition in question indicates that the opposition to war must be "by reason of religious training and belief," meaning "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," but not including "essentially political, sociological, or philosophical views or a merely personal moral code." On his Form 150, appellant indicated that he did not believe in a Supreme Being and that his views were philosophical and personal rather than "religious" as that term is defined by the statute. Under these circumstances, appellant's claim was not the kind covered by the statute, and the provisions for inquiry and hearing are not applicable.

Sincerity of belief is the essence of the inquiry made by the Department of Justice in conscientious objector classification proceedings under Section 456(j), and Congress provided for such inquiries in order to assist in determining the sincerity of claimants' beliefs. *Bousiden v. United States*, 251 F. 2d 728 (10th Cir. 1958); *Selby v. United States*, 250 F. 2d 666 (9th Cir. 1957); *Bradshaw v. United States*, 242 F. 2d 180 (10th Cir. 1957). Since this is so, there would be no purpose in providing a hearing for claimants whose beliefs, even if completely sincere, are excluded by the statute from conscientious objector status as a basis for exemption from military service. Appellant's beliefs, as stated by him, fall within this category, and a hearing in his case would have been pointless. The statute plainly does not give the Department of Justice the authority to hold hearings in such cases, but even

if appellant was deprived of a hearing to which he was entitled, he would not be prejudiced thereby since his own statements would necessitate the denial of his claim to conscientious objector status. *United States v. De Lime*, 223 F. 2d 96 (3rd Cir. 1955).

Not all claims to conscientious objector status, but only those based on statutory grounds, are subject to inquiry and hearing. The leading case on this point is *Clark v. United States*, 236 F. 2d 13 (9th Cir. 1956), in which the defendant based his conscientious objector claim on personal grounds not related to religion or belief in a Supreme Being. Following his classification as 1-A, he appealed and received a hearing. For certain reasons, defendant's file was subsequently closed and re-opened, and he was again classified 1-A. Again he appealed and this time no hearing was held, due to the view of the Department of Justice that it had no jurisdiction to hold a hearing since defendant's claim was not based on any statutory ground of exemption. Defendant was subsequently convicted of refusal to be inducted, and he appealed.

This Court said "[a]ppellant argues that 'all' claims to conscientious objector status require investigation and hearing. We disagree. * * * We note that we are not here dealing with the issue of the sincerity or veracity of appellant's beliefs, but rather with the problem whether any and every claim of conscientious objection requires an investigation and hearing." (p. 21.) After noting that defendant lacked belief in a Supreme Being and did not hold his beliefs "by reason of religious training and belief," this Court said:

"It is thus obvious that appellant is the type of 'objector' which the statute was designed to ex-

clude (i.e., those holding views based on political, sociological, or philosophical views or a merely personal code). Appellant does not fall within the statutory definition and the denial of his 'claim' is not subject to investigation and hearing by the Department of Justice." (p. 21.)

In view of the language of the statute and this Court's decision in the *Clark* case, appellant in the present case was not entitled to an inquiry and hearing upon the denial of his claim to conscientious objector status.

B. The Selective Service Act's Criteria for Determining Conscientious Objector Status Are Constitutional.

The "Supreme Being" clause does not constitute a "law respecting an establishment of religion" or a religious test as a qualification to public office in violation of the constitution.

George v. United States, 196 F. 2d 445 (9th Cir. 1952), *cert. denied* 344 U.S. 843 (1952);

Clark v. United States, 236 F. 2d 13 (9th Cir. 1956), *cert. denied* 352 U.S. 882 (1956), *reh. denied* 352 U.S. 937 (1956);

United States v. Mohammed, 288 F. 2d 236 (7th Cir. 1961).

The statutory exemption from military service for conscientious objectors is not a constitutional right, but is given by the grace of Congress. *Richter v. United States*, 181 F. 2d 591, 593 (9th Cir. 1950). Consequently, Congress can eliminate the exemption or condition it in any manner, perhaps even unreasonably

and arbitrarily. *George v. United States, supra*; *Clark v. United States, supra*. However, the present provisions of law defining who may be exempt from military service as a conscientious objector, enacted by Congress in its legislative policy of attempting to avoid unnecessary clashes between the requirements of the law and the dictates of men's conscience, is neither arbitrary nor unreasonable. Although the content of the term "religion" is incapable of compression into a few words, the statutory definition of "religious training and belief" comports with a standard or accepted understanding of the meaning of religion in American Society. *United States v. Kauten*, 133 F. 2d 703 (2nd Cir. 1943); *George v. United States*, 196 F. 2d 445 (9th Cir. 1952); *cert. denied* 344 U.S. 843 (1952). Congress could reasonably have concluded that compelling military service from a person who believes he has a duty toward God not to render such service creates a greater conflict between conscience and the law than is caused by compelling military service from a person who resists it due to duties to himself or other human beings. If Congress could not constitutionally limit the conscientious objector exemption on the basis of certain beliefs, it would be forced to exempt any person who did not choose to enter military service, or to abolish the exemption entirely and compel military service from everyone—even those religiously opposed to it. The Constitution does not require Congress to make such a choice.

VI.

CONCLUSION.

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. NISSEN

